

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
SUBSTANTIAL DEVELOPMENT PERMIT
CONDITIONALLY GRANTED BY THE
CITY OF SEATTLE TO PAUL C.
STEPHANUS,

PAUL C. and BARBARA H.
STEPHANUS,

Appellants,

v.

CITY OF SEATTLE,

Respondent.

SHB No. 83-49.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, a request for review of a shoreline substantial development permit conditionally granted by the City of Seattle to Paul C. Stephanus, came on for hearing before the Shorelines Hearings Board; Gayle Rothrock, Lawrence J. Faulk, Rodney M. Kerslake, Nancy R. Burnett, and A. M. O'Meara, convened at Seattle, Washington, on March 9, 1984. Administrative Appeals Judge William A. Harrison presided.

1 Appellants appeared by their attorney Richard U. Chapin.
2 Respondent City of Seattle appeared by Gordon S. Crandall of the
3 Seattle Law Department. Reporter Bibi Carter recorded the proceedings.
4 Witnesses were sworn and testified. Exhibits were examined. From
5 testimony heard and exhibits examined, the Board makes these

6 FINDINGS OF FACT

7 I

8 This matter arises on Lake Washington in the Windermere section of
9 Seattle. Appellants, Mr. and Mrs. Stephanus, seek to construct their
10 personal single-family residence on a waterfront lot. On June 2,
11 1983, appellants applied to the City of Seattle for a shoreline
12 substantial development permit for a shoreline protective structure.
13 The purpose of the structure is to protect the lot from erosion caused
14 by the waters of the lake. The structure consists of sills at sharp
15 angles to the shore on either side of the appellants' lot with stone
16 or gravel spread along the shoreline between the sills.

17 II

18 On October 11, 1983, Seattle conditionally granted a substantial
19 development permit for the protective structure. The State Department
20 of Ecology (DOE) requested review from this Board in our No. 83-50, a
21 companion case to this one which has been settled by agreed order
22 changing slightly the design of the protective structure.

23 III

24 Appellants also requested review of condition number 1. of the
25 permit granted by Seattle. This provides:

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
SHB No. 83-49

1 2. The use will not interfere with public
2 use of public shorelines;

3 3. Design and appearance of the development
4 will be compatible with the design and appearance of
5 surrounding uses; and

6 4. The use will not be contrary to the
7 general intent of the Shoreline Master Program of the
8 city.

9 In authorizing a shoreline special use, the
10 director may impose requirements and conditions in
11 addition to those expressly set forth in this chapter
12 with respect to location, installation, construction,
13 maintenance and operation and extent of open spaces
14 as may be deemed necessary for the protection of
15 other properties in the shoreline environment or
16 vicinity and the public's interest in the shoreline.

17 VI

18 The SSMP also provides, pertinent to this matter:

19 Residential structures on waterfront lots shall
20 not be located closer to the shoreline than adjacent
21 structures. If there is no other structure within
22 one hundred feet, residential structures shall be
23 located at least twenty-five feet back from the line
24 of ordinary high water. SSMP Sec. 24.60.395(F.), p.
25 199.

26 Seattle interprets the term "shoreline" in the first sentence of
27 the above provision to mean ordinary high water.

28 VII

29 In evaluating appellants' application, Seattle also referred to
30 the following SSMP provision:

31 The UR environment is intended to protect areas
32 which are appropriate primarily for residential
33 uses. The purpose of the UR environment designation
34 is to maintain the existing residential character of
35 the designated area in terms of bulk, scale, and
36 general types of activities and developments. SSMP
37 Sec. 24.60.340, p. 195.

VIII

There is an existing home on the adjacent lot to the north of the site. It is within one hundred feet of the proposed homesite. There are several vacant lots to the south of the site. In response to appellants' application, Seattle endeavored to measure the setback of the adjacent home from the ordinary high water mark. This was complicated by the fact that the adjacent lot to the north had been filled into Lake Washington since the advent of the Shoreline Management Act, but apparently without any shoreline permit. Seattle, therefore, excluded that fill from its determination and "interpolated" the location of the ordinary high water mark previous to that fill (old OHWM). Appellants have not proven that Seattle fixed the location of the old OHWM incorrectly. The adjacent home to the north is set back 36 1/2 feet from the old OHWM.

IX

Applying condition number 1. of the subject permit (see Finding of Fact III, above), Seattle contends that the residential setback on appellants' lot is 36 1/2 feet back from the old OHWM. Appellants contend that the setback should be measured from the new OHWM which would be at least 5 feet further waterward as a result of the protective structure (see Finding of Fact IV, above) authorized by the permit. Notwithstanding this, the relief requested by appellants is that they be allowed a residential setback which is the more landward of either; a) the correct setback distance measured from the new OHWM or b) the landward edge of the Seattle sewer line easement which

1 crosses their lot roughly parallel to the shore. This would align the
2 waterward wall of the appellants' residence with that of the adjacent
3 residence. View from the waterward side of the adjacent residence
4 would not be impaired under these circumstances. The setback imposed
5 by condition number 1. of the permit is at least partially landward of
6 that requested by appellants.

7 X

8 Any Conclusion of Law which should be deemed a Finding of Fact is
9 hereby adopted as such.

10 From these Findings of Fact the Board comes to these

11 CONCLUSIONS OF LAW

12 I

13 We review the proposed development for consistency with the
14 applicable (Seattle) shoreline master program and the provisions of
15 the Shoreline Management Act (SMA). RCW 90.58.140.

16 II

17 The SMA provides the following definition of "ordinary high water
18 mark" (OHWM), at RCW 90.58.030(2)(b):

19 (b) "Ordinary high water mark" on all lakes,
20 streams, and tidal water is that mark that will be
21 found by examining the bed and banks and ascertaining
22 where the presence and action of waters are so common
23 and usual, and so long continued in all ordinary
24 years, as to mark upon the soil a character distinct
25 from that of the abutting upland, in respect to
26 vegetation as that condition exists on June 1, 1971,
27 as it may naturally change thereafter, or as it may
change thereafter in accordance with permits issued
by a local government or the department: Provided,
that in any area where the ordinary high water mark
cannot be found, the ordinary high water mark

1 adjoining salt water shall be the line of mean higher
2 high tide and the ordinary high water mark adjoining
3 fresh water shall be the line of mean high water;
(Emphasis added.)

4 The evidence shows that Seattle has granted a substantial development
5 permit for a protective structure which authorizes a waterward shift
6 of the OHWM. Once appellants build the protective structure, this new
7 OHWM, not the old one, will prevail under the SMA definition quoted.
8 Consequently, the residential setback provision, SSMP Sec.
9 24.60.395(F), must be measured from the new OHWM on the appellants'
10 lot. Conversely, Seattle was correct to measure setback from the old
11 OHWM on the adjacent lot where fill was added without a shoreline
12 permit.

13 III

14 Because the protective structure is a Special Use, the additional
15 requirements of SSMP Sec. 24.60.525(H.) apply. That section
16 authorizes conditions with respect to location (setback) in addition
17 to those expressly set forth elsewhere in the SSMP such as the usual
18 residential setback provided in Sec. 24.60.395(F.). Such conditions
19 may only be imposed where:

20 ...necessary for the protection of other properties
21 in the shoreline environment or vicinity and the
22 public's interest in the shoreline. SSMP Sec.
23 24.60.525(H.).

24 IV

25 In this case, permit condition number 1. is inconsistent with SSMP
26 Sec. 24.60.525(H.). This comes about not by the mere fact that

1 condition number 1. requires setback to be measured from the old
2 OHWM. In another case this might be a proper means to effectuate the
3 requirements of Sec. 24.60.525(H.). It is not a proper means in this
4 case because the resulting setback is more than is necessary to protect
5 other properties in the shoreline environment or vicinity and the
6 public's interest in the shoreline, which is the stated object of Sec.
7 24.60.525(H.).

8 V

9 In this case, the proposed development would be consistent with
10 the SMA and the provisions of the SSMP cited by the parties if the
11 language of condition number 1. were stricken and the following
12 substituted in its place:

13 The shoreline residential setback of the site shall
14 be the more landward of: a) a line 36 1/2 feet
15 landward of and parallel to the shoreline (ordinary
16 high water mark) resulting from the new protective
17 structure referred to in the Stipulation and Order of
Dismissal in SHB No. 83-50 or b) the landward edge of
the Seattle sewer line easement which crosses the
site.

18 Such a permit should be granted by Seattle.

19 VI

20 Any Finding of Fact which should be deemed a Conclusions of Law is
21 hereby adopted as such.

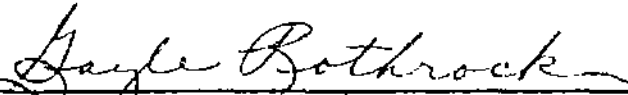
22 From these Conclusions of Law the Board enters this
23
24
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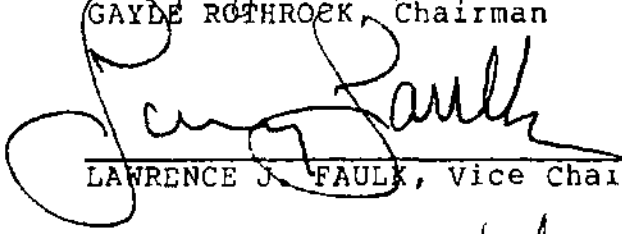
ORDER

The shoreline substantial development permit granted by the City of Seattle to Paul C. Stephanus is reversed as to condition number 1. and remanded for reissuance on the same terms as previously granted but with: a) the substitute language of condition number 1. set out in Conclusion of Law IX, above, and b) the stipulated site plan for the shoreline protective structure referred to in the Stipulation and Order of Dismissal in SHB No. 83-50.

DONE at Lacey, Washington, this 27th day of April, 1984.

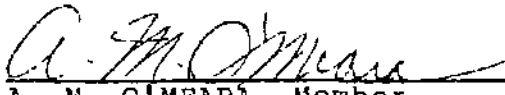
SHORELINES HEARINGS BOARD

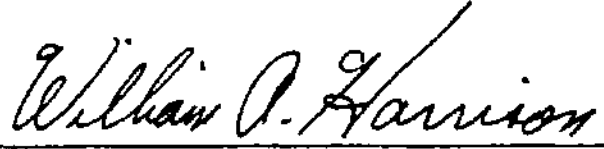

GAYLE ROTHROCK, Chairman


LAWRENCE J. FAULK, Vice Chairman


RODNEY M. KERSLAKE, Member


NANCY R. BURNETT, Member


A. M. O'MEARA, Member


WILLIAM A. HARRISON
Administrative Law Judge